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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

No.

IN THE MATTER OF

COMMONWEALTH FINANCIAL CORPORATION AND ITS SUBSIDIARIES, NEIGHBORHOOD FINANCE CO., INC. AND NEIGHBORHOOD FINANCE CO., INC. OF PENNSYLVANIA,

Debtors,

MORISE THAL,

Appellant.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Morise Thal prays that a Writ of Certiorari issue to review the affirmance by the United States Court of Appeals for the Third Circuit of an Order of the bankruptcy Court of March 19, 1969 entered March 21, 1969 in the above entitled case.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court of the Eastern District of Pennsylvania is reported at 288 F. Supp. 786 (1968). The opinion of the Court of Appeals for the Third Circuit is attached hereto in the Appendix. It has not yet been reported.

JURISDICTION.

The Judgment of the Court of Appeals of the Third Circuit was made on March 19, 1969 and an order was entered on March 21, 1969. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254, 62 Stat. 928 (1948).

QUESTIONS PRESENTED.

1. Whether the District Court, in a Chapter X reorganization proceeding under the Bankruptcy Act, has the discretion to permit the Securities and Exchange Commission to participate, directly or indirectly, in a public examination of officers and directors of debtor corporations under Section 167 of the Bankruptcy Act.

2. If so, whether the District Court abused its discretion in permitting the Commission to so participate where the Commission is concurrently conducting a non-public investigation of such corporations to determine whether criminal violations of the Federal Securities Acts have been committed by such officers and directors.

3. If so, whether the District Court abused its discretion in permitting the Commission to so participate, especially in Appellant's examination, and in denying Appellant's motion for a protective Order where:

(a) Appellant has already testified in that non-public investigation, is subject to criminal prosecution under the Federal Securities Acts;

(b) The Commission announces its intention to examine appellant specifically on "Violations of the Federal Securities Laws" although a Section 167 examination relates to matters relevant to the desirability of the continuance of the debtor's business and/or formulation of a reorganization plan; or

(c) (1) The trustees have admitted that they and the Commission have "cooperated" with each other notwithstanding that the disclosure of information and documents obtained by the Commission in its non-public investigation are by law confidential and cannot be disclosed; and

(2) Appellant has alleged and the Commission has not denied that the Commission has divulged and, in the Section 167 examination, necessarily will divulge to unauthorized persons, including the trustees, such information and documents obtained by the Commission in its non-public investigation.

STATEMENT OF THE CASE.

This is an appeal from a Judgment of February 24, 1969 of the Circuit Court of Appeals for the Third Circuit affirming an Order of the United States District Court for the Eastern District of Pennsylvania entered on July 11, 1968, in a corporate reorganization proceeding (Proceeding) under Chapter X of the Bankruptcy Act, (a) directing appellant, Morise Thal, to be sworn and to testify as a witness in such depositions as may be scheduled by the trustees pursuant to Section 167 of the Bankruptcy Act, and (b) denying appellant's motion for a protective order.

On December 4, 1967, the debtor corporations filed a petition in the District Court for the Eastern District of Pennsylvania for a corporate reorganization pursuant to Chapter X of the Bankruptcy Act, 11 U. S. C. § 501 et seq.

Prior to the institution of the Proceeding, the Securities and Exchange Commission (Commission) had commenced and is still conducting a separate non-public investigation into the affairs of the debtors under the provisions of Section 20(a) of the Securities Act of 1933, 15 U. S. C. § 77t(a), and Section 21(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78u(b), to determine whether violations of these Acts have occurred. (These acts provide for criminal prosecution.) In the course of the non-public investigation, the appellant, who is subject to criminal prosecution, was examined by the Commission pursuant to a subpoena on March 5, 1968, and he remains subject to recall as a witness in that investigation.

By order entered March 20, 1968 in this Proceeding, upon petition of the trustees, the Honorable John Morgan Davis of the Federal District Court granted the trustees leave to investigate the "acts, conduct, property, liabilities and financial condition of the debtors", such investigation to include an examination of the "directors and officers of the debtors", pursuant to Section 167 of the Bankruptcy

Act, 11 U. S. C. § 567. Said Order was amended on May 23, 1968 to authorize examination by deposition.

On March 21, 1968, the First Interim Report of Trustees was filed in the District Court. The Report described, *inter alia,* the working relationship between the trustees and representatives of the Commission:

> "Conferences have been held with representatives of the Securities and Exchange Commission, who have entered their appearance and become a party to these proceedings. The Trustees have endeavored to extend full cooperation to the Securities and Exchange Commission, and in return have received helpful suggestions in the administration of the Debtor's estate.
>
> "The court is hereby advised that, apart from the normal participation in this proceeding of the Reorganization Section of the Securities and Exchange Commission located in New York, representatives of the investigatory division of the Securities and Exchange Commission in Washington have been conducting an investigation into the affairs of the Debtors for several months. The Trustees have extended their cooperation in this investigation by permitting the Securities and Exchange Commission access to the books and records of the Debtors."

Subsequently, on March 29, 1968, the trustees filed a petition for an order authorizing the Commission to participate in the Section 167 examination, averring that the petition was filed upon request of the Commission, and that such participation would assist the trustees in their investigation. On the same day Judge Davis entered the requested Order *ex parte.*

On June 6, 1968, the trustees filed their notice to take the oral deposition of appellant on June 13, 1968.

At that scheduled examination, counsel for the Commission were prepared to examine appellant on matters involving "violations of the Federal Securities laws including, but not limited to, the Securities Act of 1933 and the Securities and Exchange Act of 1934." No reference was made by counsel for the Commission to any other type of statute.

Also present at the examination and privy to discussions between counsel for the trustees and counsel for the Commission, with regard to the acceptability of the aforesaid proposal of counsel for appellant, was James Kennedy, Esquire, an attorney employed by the Regional Office of the Commission in Washington, D. C. and engaged in the non-public investigation in which appellant was examined as a witness. Following objections by counsel for appellant to any consultation between counsel for the trustees and counsel for the Commission or any of its attorneys in connection with the deposition, counsel for the Commission declared: "I would also like to state that there is no evidence before us today that Mr. Kennedy has consulted with either the Trustee or his representative or counsel that are representing the Commission. I made no representation whether he has or has not."

On or about June 17, 1968, the trustees filed a motion directly with Judge Davis seeking an order directing appellant to be sworn and to testify. On June 18, 1968, the Court entered an Order directing that the motion be heard on June 21, 1968, and directing counsel to file memoranda by 12:00 o'clock noon of June 20, 1968.

On June 20, 1968, appellant filed an amended motion for protective order, seeking a stay of his deposition or other examination under Section 167 of the Bankruptcy Act, and an answer to the trustees' motion. Appellant's answer contained an additional motion for further relief seeking, in the alternative, a stay of appellant's examination until further order of the Court or until appellant had

an opportunity to depose counsel for the Commission and counsel for the trustees to determine the extent to which information obtained by the Commission in the aforesaid non-public investigation has been or will be disclosed to the trustees or their counsel or the Commission's counsel in this case. Appellant's motions were made on the ground that participation in the Section 167 examination by attorneys for the Commission would be a violation of the Commission's own rules and of federal regulations, concerning, *inter alia*, the confidentiality of the non-public investigation, and would greatly prejudice appellant both in the non-public investigation and the Section 167 proceeding.

On June 21, 1968, the District Court heard argument on the trustee's motion and appellant's motions for a protective order and, on July 11, 1968, filed an Opinion and Order directing appellant to be sworn and to testify as a witness.

Appeal was taken to the Court of Appeals for the Third Circuit. The appeal was argued on January 20, 1969 and the Order of the District Court was affirmed on February 24, 1969 in a per curiam opinion.

REASONS FOR GRANTING THE WRIT.

1. Philosophically there is a conflict bewteen two Circuit Courts of Appeals on the subject involved in this case. In Securities and Exchange Commission v. Honorable George Templar, No. 10114 decided by the Tenth Circuit Court of Appeals on January 3, 1969 that Court decided that the law relating to reorganization proceeding does not give the "Commission superior rights to other parties." In the instant case the Court "authorized the Commission to participate in the Section 167 examination of witnesses" and therefore did give the Commission superior rights to any other party. We respectfully submit that the contrary legal position of the two Circuit Courts should be resolved by the Supreme Court.

2. The instant case presents squarely for decision for the first time the right of the Securities and Exchange Commission to participate in examination under Section 167 of the Bankruptcy Act. The permission granted by the District Court and affirmed by the Circuit Court in this matter seems to be contrary to the trend of civil rights and liberties presently extended by all Courts of the United States. Disregarding all of the technicalities involved, the net effect of the decision of the lower court in this instance is to give the Commission an avenue of discovery and exploration that was not granted to it by Congress and to the detriment of the fair treatment of officers and employees of a debtor corporation.

3. The Circuit Court has interpreted the provision of the Banktruptcy Act which permits the Commission to become a party in interest with the right "to be heard" as including the authority to participate in the questioning which is intended primarily for the benefit of the trustees. The decision goes far beyond the bounds of reason.

4. The District Court, in a Chapter X reorganization proceeding under the Bankruptcy Act, does not have the discretion to permit the securities and exchange commission to participate in an examination under section 167 of the Bankruptcy Act.

A. Section 167 of the Bankruptcy Act Does Not Authorize the District Court to Allow Any Party, Other Than a Trustee Who Cannot Delegate Such Duty, to Conduct an Examination of Officers and Directors of the Debtor Corporation.

The District Court clearly has the discretion to permit the trustee to examine directors and officers of the debtor and other witnesses. Section 167(2) of the Bankruptcy Act (Act) (11 U. S. C. Sec. 567(2)) provides:

> "The Trustee upon his appointment and qualification—(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them [Sec. 567(1)]."

Subsection 1 of that Section provides:

> "The trustee upon his appointment and qualification—(1) shall, if the Judge shall so direct, forthwith investigate the acts, conduct, property, liabilities and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge."

Thus, by statute, the trustee may be given the authority to conduct depositions but, as the lower Court admits in its

Opinion, the Act does not authorize Commission participation therein. The lower Court, however, bases its right to authorize such participation upon subsection 4 of Section 167 of the Act:

> "The Trustee upon his appointment and qualification—(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of *assisting* the trustee in performing the duties imposed upon him under this Chapter." (Emphasis supplied.)

The lower Court thought that the issue then is whether subsection 4 of Section 167 contemplates the "employment" of the Commission for the purpose of participating in a 167 examination and concludes that such so-called employment is discretionary with the Court. That Court and the trustees did not and cannot cite any precedent for such conclusion. The cases cited do not support the conclusion.

First, the trustees are obviously not employing the Commission. Second, the trustees have no intention of merely allowing the Commission to "assist"—the Commission has already directly participated in the attempted examination of appellant. Third, Section 208 of the Act (11 U. S. C. Sec. 608) which permits the Commission to intervene, allows it only the right to be *heard* on all matters, not the right to *examine* any witness. If Congress had intended that the Commission should have such right, surely it would have so provided.

COLLIER describes the role of the Commission as "advisory". COLLIER ON BANKRUPTCY, Vol. 6, 14th Ed., Para. 0.08(3) at p. 96. More important is the description found in House Report No. 1409 on H. R. 8046, 75th Cong., 1st Sess. (1937) at p. 48:

> "Another important feature of the bill is the provision vesting the Securities and Exchange Commission with *advisory* power in reorganizations. Its functions will be those, so to speak, of an expert, administrative agency, which acts in an *advisory* capacity to the Court and thus indirectly to interested parties in the reorganization." (Emphasis supplied.)

There is no indication whatsoever in any Congressional Report that it ever intended anyone, other than the trustee, to examine witnesses pursuant to Section 167.

The only conceivable right that the Commission may have concerning a 167 examination is to petition the Court that such examination be conducted by the trustee. As stated in Para. 7.19(1), Vol. 6, 14 Ed. of COLLIER ON BANKRUPTCY at p. 1221:

> "Although ordinarily it will be the trustee who will seek the judge's authorization of an examination under Sec. 167(2) there is nothing to prevent any party in interest from petitioning the judge for an order that the trustee undertake an examination."

Further, it is clear that subsection 4 of Section 167 contemplates the hiring of persons such as those who can assist in running the debtor's business, those who can assist in preparing financial statements and those who can assist in appraising the value of the debtor's property, all of whom are hired because of certain expertise in their respective areas. See COLLIER ON BANKRUPTCY, Vol. 6, 14th Ed., Para. 7.21 at pp. 1229-32.

It is thus clear that:

> "The duty to conduct such preliminary investigation falls upon the disinterested trustee . . ." COLLIER ON BANKRUPTCY, Vol. 6, 14th Ed., Para. 7.17, at p. 1208;

and

> "The position of the Commission in reorganization proceedings is in effect that of an *amicus curiae*—a disinterested and expert agency whose function it is to aid in the efficient and fair functioning of the reorganization process." COLLIER ON BANKRUPTCY, Vol. 6, 14th Ed., Para. 0.09, at p. 105.

Moreover, in a Chapter X proceeding the Court *must* (rather than may in this case since the debts exceed $3,000,000) under Section 172 of the Bankruptcy Act (11 U. S. C. § 572) submit to the Commission for examination the proposed plan of reorganization. The Court thereafter cannot approve such plan until the Commission files a report thereon, notifies the Court it will not file a report or until expiration of the time fixed for filing such report has occurred. Thus, the role of the Commission is clearly to be an independent advisor to the Court and precludes the conflicting roles of assistant or employee of the trustees.

B. Assuming, Arguendo, the District Court Has Such Discretion, the District Court Abused That Discretion Since the Commission Under the Federal Securities Laws Was and Is Presently Conducting a Non-Public Investigation of the Debtor Corporations to Ascertain Whether Criminal Violations of Such Laws Have Occurred.

1. Once the Commission has determined to conduct a non-public rather than public investigation of a corporation, it cannot participate directly or indirectly in a public examination of such corporation until such time that the Commission authorizes a public investigation.

Prior to the institution of the Proceedings and continuing to date, the Commission is conducting a *non-public*

investigation of the debtor corporations pursuant to Section 20(a) of the Securities Act of 1933, 15 U. S. C. § 77t(a), and Section 21(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78u(b). The violations of those Acts call for *inter alia*, severe criminal penalties including fines and/or imprisonment.

A non-public Commission investigation is what its terms suggest—confidential. Rule 122 promulgated under the Act of 1933, 17 C. F. R. § 230.122, and Rule 0-4 promulgated under the Act of 1934, 17 C. F. R. § 240.0-4, are virtually identical and provide, *inter alia*, the following:

> "Information or documents obtained by officers or employees of the commission in the course of any examination or investigation pursuant to Section 17(a) or 21(a) [under the 1934 Act and Section 8(e) or 20(a) under the 1933 Act] shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other non-public records of the Commission available to anyone other than a member, officer or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest."

and

The Commission's own "Rules Relating to Investigation" provide:

> "Information or documents obtained by the commission in the course of any investigation or examination, unless a matter of public record, shall be deemed non-public." Rule 2, 17 C. F. R. § 203.2.

> "Unless otherwise ordered by the Commission, all formal investigative proceedings shall be non-public." Rule 5, 17 C. F. R. § 203.5.

Significantly, the Procedure in *public* investigations differ markedly from that of the aforesaid non-public investigation.

Thus, in a non-public investigation, hearings are private and any information, including documents, obtained in such proceeding is confidential to protect the privacy and rights of parties. See, LEVINSON, ADMINISTRATIVE PROCEDURES IN CONNECTION WITH INVESTIGATIONS AND HEARINGS UNDER THE SECURITIES ACT OF 1933, Securities Laws and Regulations, 1967 Institute, Univ. of Miami Law Center at p. 109.

The Commission has already elected to take the non-public route in investigating the debtor corporations. Now the Commission wishes to again examine the corporation, this time at a public hearing in a Bankruptcy proceeding where the testimony of a witness is not protected by confidentiality and such witness has neither the protection of cross-examination nor the right to produce evidence on his own behalf.

In effect, the Commission now, after gleaning information which is deemed confidential by law, wishes to publicly examine the corporation without affording those rights which the Commission must give to all witnesses in its own public investigation.

The Commission, of course, has the discretion of deciding whether to investigate the subject corporation privately or publicly. But once an administrative agency, such as the Commission herein, does make its choice, it

cannot directly or indirectly avoid the procedural rules governing that choice—it must comply with and abide by its own rules. *Elmo Division of Drixe-X Company v. Dixon,* 348 F. 2d 342, 345-46 (D. C. Cir. 1965).

Where, as here, the Commission will act in such contravention of its own rules, the courts will intervene and give relief. *R. H. Macy & Company, Inc. v. Tinley,* 249 F. Supp. 778, 782 (D. D. C. 1966).

C. Assuming, Arguendo, the District Court Has Such Discretion, the District Court Abused That Discretion.

1. Since appellant has already testified in the non-public investigation and is subject to criminal prosecution, the Commission should not be allowed to again examine him in a public examination without affording him the rights and protection to which appellant is entitled by law under a public investigation conducted by the Commission.

As demonstrated above, the rules relating to non-public Commission investigations clearly protect any information obtained thereby as confidential; and the rules relating to public investigations clearly afford any witness with at least the right to be present when testimony or other evidence is given concerning the witness, the right of cross-examination and the right to offer testimony and other forms of evidence, all of which rights were not and are not available to appellant in the Commission's non-public investigation of the subject corporations.

2. The purpose of a Section 167 examination is to evaluate the desirability of the continuance of the Debtor's business and/or to formulate a plan of reorganization, not as the Commission intends, to determine whether appellant has violated Federal Securities Laws.

The purpose of a 167 Examination is to assist the trustee in *his own* investigation of the debtor corporation in order to determine whether the business should be continued and to formulate a plan of reorganization. *Collier on Bankruptcy,* Vol. 6, 14th Ed. Paras, 7.18, 7.19, at pp. 1210-1221. Nowhere in the Act is the trustee, let alone the Commission, given the specific right to examine any witness as to violations of federal securities law. That line of inquiry is obviously without the scope of the statutory examination. However, the record of the District Court is clear that the Commission desires to utilize the examination as a fishing expedition for Securities Acts violations.

3. Since the Trustees have already admitted that the Commission is cooperating with them and appellant has alleged and the Commission has not denied that the Commission has divulged, and in the course of a Section 167 examination, necessarily will divulge to unauthorized persons, including the Trustees, confidential information, documents and lines of inquiry, obtained by the Commission in its non-public investigation, the divulgence of which is contrary to law, the Commission should not be allowed to participate in the public examination of appellant.

The only conceivable remedy to avoid this unlawful disclosure of confidential information by the Commission is for this Court to absolutely preclude the Commission from participating in any way in the deposition of appellant.

CONCLUSION.

It is respectfully submitted that the order of the District Court authorizing the Securities and Exchange Commission to participate in the Section 167 examination is a violation of civil rights, constitutional liberties and is basically unreasonable. For the reasons stated it is respectfully requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

ALBERT B. GERBER,
1512 Walnut St.,
Phila., Pa.,
Attorney for Petitioner.

APPENDIX.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 17455.

IN THE MATTER OF:
COMMONWEALTH FINANCIAL CORPORATION
AND ITS SUBSIDIARIES,
NEIGHBORHOOD FINANCE CO., INC., AND
NEIGHBORHOOD FINANCE CO., INC.
OF PENNSYLVANIA

MORISE THAL, PRESIDENT OF THE DEBTORS CORPORATIONS,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued January 20, 1969

Before HASTIE, *Chief Judge*, and MCLAUGHLIN and STAHL, *Circuit Judges*.

OPINION OF THE COURT.

(Filed February 24, 1969.)

PER CURIAM.

The present controversy has arisen during the course of a corporate reorganization proceeding under Chapter X of the Bankruptcy Act. The Securities and Exchange Com-

mission became a party to this proceeding, as authorizing by section 208 of Chapter X, 11 U.S.C. § 608, by filing and obtaining the court's approval of its notice of appearance. Subsequently, the court authorized the trustees to conduct an examination of witnesses, including officers and directors of the debtor, as provided in section 167. 11 U.S.C. § 567. Thereafter, on petition by the trustees, the court authorized the Commission to participate in the section 167 examination of witnesses.

The trustees called the appellant, who is president of the debtor corporation, for examination. He refused to be sworn or to testify because of the Commission's intention to participate. The matter was submitted to the court which rejected the excuse and ordered the witness to testify. This appeal was then taken to test the right of the Commission to participate in the examination of the appellant.

Section 208 provides that after the Commission's request to appear shall have been approved by the court, "the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceedings. . . ." The Court of Appeals for the Fifth Circuit has recently construed this section as authority for the examination of witnesses by the Commission at a hearing to determine whether certain shareholders should be deprived of their stock. *Securities and Exchange Comm. v. Krentzman,* 1968, 397 F.2d 55. And see *Securities and Exchange Comm. v. Templar,* 10th Cir. 1969, — F.2d —, 37 U.S.L.W. 2406. We find no canon of interpretation and no reason or policy that would dictate a narrower interpretation to make section 208 inapplicable in the present context. We note in this regard that in this case both the court and the trustees have approved the participation of the Commission in the section 167 examination.

It is suggested that information obtained by the Commission through its examination of the appellant might later be used against him in a related criminal proceeding. Of course the same danger would be inherent in examination by the trustees. However, in either event the witness is free to resist examination by asserting his privilege against self-incrimination. This the appellant has not done.

The order requiring the appellant to be sworn and to testify as a witness will be affirmed.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 17455.

IN THE MATTER OF:
COMMONWEALTH FINANCIAL CORPORATION
AND ITS SUBSIDIARIES,
NEIGHBORHOOD FINANCE CO., INC., AND
NEIGHBORHOOD FINANCE CO., INC.
OF PENNSYLVANIA

MORISE THAL, PRESIDENT OF THE DEBTORS CORPORATIONS,
Appellant.

ORDER SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge*, and KALODNER, FREEDMAN, SEITZ, VAN DUSEN, ALDISERT and STAHL, *Circuit Judges.*

The petition for rehearing filed by MORISE THAL, President of the debtors corporations, Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
(Sgd.) WILLIAM H. HASTIE, *Chief Judge*

Dated: March 19, 1969

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 17455.

IN THE MATTER OF:
COMMONWEALTH FINANCIAL CORPORATION
AND ITS SUBSIDIARIES,
NEIGHBORHOOD FINANCE CO., INC., AND
NEIGHBORHOOD FINANCE CO., INC.
OF PENNSYLVANIA
MORISE THAL, PRESIDENT OF THE DEBTORS CORPORATIONS,
Appellant.
(D. C. No. 30108 in Bankruptcy)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: HASTIE, *Chief Judge* and MCLAUGHLIN and STAHL, *Circuit Judges.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court requiring the appellant to be sworn and to testify as a witness, filed July 11, 1968, be, and the same is hereby affirmed, with costs.

ATTEST:
THOMAS F. QUINN, *Clerk.*

February 24, 1969

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

IN PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION UNDER CHAPTER X OF THE BANKRUPTCY ACT.

CAUSE NO. 30108.

IN THE MATTER OF

COMMONWEALTH FINANCIAL CORPORATION AND ITS SUBSIDIARIES, NEIGHBORHOOD FINANCE CO., INC. AND NEIGHBORHOOD FINANCE CO., INC. OF PENNSYLVANIA,

Debtors.

OPINION.

DAVIS, *J.*

Under authority of Section 167 of the Bankruptcy Act, 11 U. S. C. § 567, the trustees in this Chapter X proceeding were granted leave to investigate the "Acts, conduct, property, liabilities and financial condition of the debtors", to include an examination of the "directors and officers of the debtors."[1] Subsequently, the Securities and Exchange Commission (S. E. C.) was authorized to participate and assist in the aforementioned investigation.[2]

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1. See Petition of Trustees for Order Directing Investigation of Debtors and Examination of Witnesses Under Section 167 (document 34), entered on March 21, 1968. This Order was subsequently amended on May 23, 1968, to authorize examinations by way of depositions (document 45).

2. See Petition of Trustees for Order Authorizing the Securities and Exchange Commission to Participate in Examination (document 41), filed on March 29, 1968.

We have since been apprised by the petitioner that the S. E. C. has apparently been conducting a separate and independent investigation of the affairs of the debtors, under the provisions of Section 20(a) of the Securities Act of 1933,[3] and Section 21(b) of the Securities Exchange Act of 1934.[4] This investigation has included an examination of the petitioner (by his own assertion) pursuant to "continuing subpoena" by the S. E. C. We shall assume, *arguendo,* that the petitioner may be recalled by the S. E. C. either concurrent with, or subsequent to the trustees' Section 167 investigation. It is possible that the petitioner may be subjected to criminal prosecution if the S. E. C. investigation would indicate that such action is appropriate.[5] At this time, however, there has been no criminal proceeding instituted against the petitioner; this opinion will be predicated upon that premise.

---

3. 15 U. S. C. § 77t(a), which states, in relevant part:

Whenever it shall appear to the Commission . . . that the provisions of this subchapter [domestic] securities . . . have been or are about to be violated, it may . . . require such person to file . . . a statement . . . under oath . . . as to all the facts and circumstances . . . .

4. 15 U. S. C. § 78u(b), which states, in relevant part:

For the purpose of any such investigation, [securities exchanges] . . . the Commission . . . is empowered to . . . subpoena witnesses, compel their attendance, take evidence and require the production of any books, papers, correspondence . . . .

5. 15 U. S. C. § 77x states, in relevant part:

Any person who wilfully violates any of the provisions of this subchapter [Securities] . . ., or any person who wilfully in a registration statement filed under this subchapter, makes any untrue statement of a material fact, or omits to state any material fact . . . shall upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

See also 15 USC § 78ff(a) providing a maximum of $10,000 fine and/or two years imprisonment for wilful violation of securities exchange regulations, or for filing false registration statements.

After receiving written notice of depositions by the Chapter X trustees (with participation by the S. E. C.),[6] the petitioner, Morise Thal, president of the debtor corporations,[7] filed the motion for a protective order presently before the Court,[8] seeking a stay of any further attempts to depose or otherwise examine him by the trustees, during the pendency of the S. E. C. investigation.

I.

Preliminarily, the petitioner is contesting the authority of the S. E. C. to participate in an investigation ostensibly conducted under Section 167 of the Bankruptcy Act. It is true that the Act does not expressly authorize S. E. C. participation in the Section 167 investigation. However, this section clearly states that the trustees . . .

> may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter.

Having just obtained the requisite leave of court, *In Re Flamingo Hotel Co.*, 81 F. 2d 749 (7th Cir. 1936), the only question remaining is whether this statute contemplates the "employment" (albeit without compensation) of the S. E. C.

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6. Written notice was tendered to the petitioner on June 6, 1968 (document 48).

7. The petition for reorganization filed December 4, 1967 was signed by Thal as president of the principal and 2 subsidiary debtor corporations. On January 29, 1968, Thal was retained by the trustees as "Chief Operating Officer" (document 10).

8. On June 13, 1968, an effort was made by the trustees to depose Thal. However, he refused to be sworn, apparently on advice of his counsel. Subsequently, the trustees filed a "Motion of Trustees for Order Directing Witness to be Sworn and to Testify", which is also presently before the Court (document 55).

for the purpose, *inter alia* of assisting in a Section 167 investigation.

Under Section 208 of the Bankruptcy Act, 11 U. S. C. § 608, the S. E. C. if approved by the Court, is given the right to proceed as a party in interest "with a right to be heard in all matters . . ." In *In Re Otis & Co.*, 104 F. Supp. 201, 203 (N. D. Ohio, 1952), it was observed that Congress, by authorizing participation by the S. E. C. in a Chapter X reorganization:

> ". . . intended material assistance between the Court and the Commission and that to insure harmony the grants of power alluded to above [Sections 172 and 208 participation] were intended to subject the Securities and Exchange Commission to the orders of a reorganization court. . . .

If the court is statutorily vested with discretion 1), to authorize participation *generally*, under Section 208, and 2), to limit S. E. C. participation *specifically* when deemed necessary, *In Re Otis*, supra, and cases cited therein, it follows that the Court has sufficient authority to permit S. E. C. participation for particular aspects of a Chapter X reorganization, such as the Section 167 investigation at issue. In so holding, however, we wish to reemphasize that participation is discretionary with the Court *In Re Morris White Properties Corp.*, 21 F. Supp. 635 (E. D. N. Y. 1937). Since abuse of that discretion has not been established or even alleged, participation by the S. E. C. in the contemplated section 167 investigation will be permitted.

II.

Turning to the merits of petitioner's motion, we agree that it is quite possible that the scope of the S. E. C. investigation may, to some extent, encompass the same subject

matter as the Section 167 investigation conducted under the auspices of the trustees. Both statutes essentially contemplate to some extent, the devolution of fraudulent practices by persons in control and operation of the debtor corporation.[9] Parenthetically, we observe that the S. E. C. apparently shares this view, since the petitioner was recently warned by its counsel that:

> . . . as a witness . . . the facts developed in these proceedings conducted by the trustees . . . may constitute violations of the Federal Securities laws including but not limited to the Securities Act of 1933 and Exchange Act of 1934. . . . Since any evidence you give could be used against you, you may refuse to give any testimony.[10]

III.

Unless the contemplated Section 167 deposition is stayed, the petitioner asserts that his privilege against self-

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9. For example Section 17(a) of the Securities Act of 1933, 15 U. S. C. § 77q(a) states, in relevant part, that:

> It shall be unlawful for any person in the offer or sale of any securities . . . directly or indirectly—
>
> (1) to employ any device, scheme or artifice to defraud, or
>
> (2) to obtain money or property by means of any untrue statement of a material fact . . . or
>
> (3) to engage in any transaction . . . which operates . . . as a fraud or deceit upon the purchaser.

By comparison, Section 167 of the Bankruptcy Act, 11 U. S. C. § 567 requires the trustees, pursuant to their investigation, to ". . . report to the judge any facts ascertained by him [trustee] pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the [debtor's] estate." The scope of the Section 167 investigation is rather comprehensive, and includes ". . . the acts, conduct, property, liabilities and financial condition of the debtor, the operation of its business . . . and any other matter relevant to the proceeding . . .", including authority to ". . . examine the officers and directors of the debtor . . ."

10. Oral deposition of Morise Thal, June 13, 1968, p. 6 (document 56).

incrimination under the 5th Amendment to the Constitution will be infringed. This assertion is further developed by hypothesizing that the S. E. C. is empowered to grant "full constitutional immunity." from the imposition of any penalty in connection with the S. E. C. investigation,[11] but that no such arrangement is available under Chapter X of the Bankruptcy Act. Thus, it is asserted that the S. E. C. could conceivably play one investigation against the other, eliciting (and utilizing in a criminal proceeding) information which would otherwise be immune pursuant to the statutes cited in footnote 11, below. We do not agree. While it is true that no comparable statutory immunity may be offered by the trustees during the Section 167 investigation, the petitioner is always free to assert his 5th Amendment right against self-incrimination at any time. The privilege may be asserted in any proceeding," . . . be it criminal or civil, administrative or judicial, investigatory or adjudicatory." *United States v. Goldsmith,* 272 F. Supp. 924, 926 (E. D. N. Y. 1967), citing *Murphy v. Waterfront Commission,* 378 U. S. 52, 94 (1964).

Nor would the privilege against self-incrimination extend only to matters which are directly related to the ultimate objective of the trustees' investigation, namely, to effect an equitable reorganization. The petitioner may assert his 5th Amendment rights to protect himself from ". . . any disclosures which . . . [he] may reasonably apprehend could be used in a criminal prosecution or which

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11. Section 22 of the 1933 Act, 15 U. S. C. § 77v(c), pertaining to securities, states in relevant part:

> No person shall be excused from attending and testifying . . . on the ground that the testimony . . . may tend to incriminate him . . ., but no individual shall be prosecuted . . . concerning which he is compelled after having claimed his privilege against self incrimination to testify.

See also Section 21 of the 1934 Act, 15 U. S. C. § 78u(d), which provides for a similar provision regarding securities exchanges.

could lead to other evidence that might be so used." *Murphy,* supra, recently cited with approval in *Matter of Gault,* 387 U. S. 1 (1967). Armed with such protection, the petitioner neither needs, nor is constitutionally, statutorily or equitably entitled to the protective order which he now seeks.

IV.

The fact that a contemplated area of inquiry may be *potentially* incriminatory does not authorize or indeed require a blanket invocation of the privilege against self-incrimination:

> . . . it is not and has never been the law that the privilege disallows the asking of *potentially* incriminatory questions or authorize the person of whom they are asked to evade them without *expressly* asserting that his answers may tend to incriminate him (emphasis added).

Communist Party v. Subversive Activities Control Board, 367 U. S. 1, 108 (1961).

Recently, in *In Re Hoffman Can Corp.,* 373 F. 2d 622 (1967), the Third Circuit rejected a rather similar effort to invoke a blanket privilege against self-incrimination. In *Hoffman,* the officers of a bankrupt corporation refused to file a statement of affairs,[12] together with supporting schedules, claiming that certain responses contained therein may tend to be incriminating. In so deciding, the Third Circuit substantially relied upon *United States v. Sullivan,* 274 U. S. 259 (1927), a leading decision in the area of income tax law, where it was emphasized that:

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12. As required by Sections 7 to 9 of the Bankruptcy Act, 11 U. S. C. § 25-27.

> . . . a claim of self-incrimination against every question . . . would be virtually frivolous.

Although it is theoretically conceivable that the petitioner Thal may find every question objectionable when propounded, it is anticipated and indeed hoped that he has not become so deeply embroiled in questionable practices, that he need assert his 5th Amendment privilege to *each* and *every* question of the trustees.[13]

V.

Both sides have placed forceful reliance upon some facet of *United States v. Simon,* 262 F. Supp. 64 (S. D. N. Y. 1966), reversed, 373 F. 2d 649 (2nd Cir. 1967).[14]

In *Simon*, a judge of the Southern District of New York, before whom a *criminal* proceeding for mail fraud was pending, enjoined for a period of 90 days, the further deposing of defendants who had also been sued in a *civil* proceeding pending in the Eastern District of New York. The latter action was being prosecuted by Chapter X trustees, alleging that the common defendants had conspired to despoil assets of the debtor corporation, by *inter alia,* preparing and certifying false financial statements.[15]

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13. Nor would there be any obligation on the part of the trustees to refrain from directing inquiries to the petitioner because the answers may be incriminating. *United States v. Alaimo,* 191 F. Supp. 625, 630 (M. D. Pa. 1961) aff'd., 297 F. 2d 604 (3rd Cir. 1962) and cases cited therein.

14. Although reversed by the Second Circuit, Mr. Justice Harlan as Circuit Justice, stayed the execution and enforcement of the Circuit Court decree. Certiorari was granted, sub nom. *Simon v. Wharton,* 386 U. S. 1030 (1967), but subsequently vacated, as moot. 387 U. S. 425 (1968).

15. In the criminal proceeding pending in the Southern District, the defendants were charged with: mail fraud, 118 U. S. C. § 1341; filing false and misleading reports in violation of the S. E. C. Act of 1934, 15 U. S. C. § 78ff; and violation of an analogous provision of the Criminal Code, 18 U. S. C. § 1001.

Although *Simon* presented a factually stronger case for some form of protective order than the instant case, since the defendants had already been indicted in the criminal proceeding, the Second Circuit nonetheless decreed that additional protection was unnecessary:

> The fact that additional testimony thereby becomes available to the government is merely the natural by-product of another judicial proceeding; and to that extent it is not discovery . . .

The Court then continued:

> Indeed, the constitutional rights of the appellees are unimpaired; here they are in suspension because the appellees have not chosen to avail themselves of their Fifth Amendment privileges. *United States v. Simon, supra,* at p. 652.

We recognize that the reasoning manifested by the Second Circuit in *Simon* has been subjected to rather diverse interpretation. Compare e.g., *Philadelphia Housing Authority v. American Radiator & Standard Sanitary Corp.*, 269 F. Supp. 540 (E. D. Pa. 1967), with *United States v. American Radiator & Standard Sanitary Corp.*, 272 F. Supp. 691 (W. D. Pa. 1967) reversed, 388 F. 2d 201 (3rd Cir. 1967).[16] Whether any criminal action will ultimately be instituted is presently a matter of conjecture or, as best may be characterized as the professional opinion of the petitioner or his counsel. This is insufficient justification for the sweeping protection which the petitioner seeks.

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16. See *United States v. Birrell,* 272 F. Supp. 798, 810 (S. D. N. Y. 1967), where a criminal defendant unsuccessfully sought to enjoin Chapter X trustees from examining and otherwise making use of records and documents pertaining to the debtor corporations. Civil suits had also been commenced by the trustees against the defendant.

VI.

Finally, it is asserted that the trustees will not be prejudiced, since they are free to proceed with their investigation, and take the deposition of "any and all witnesses" (excepting only Thal). Absent the existence of any constitutional protection, this argument fails to consider the prominent position which Thal has held as former chief executive officer of the debtor corporation, and the immeasurable assistance which he is potentially capable of rendering in furtherance of an equitable reorganization of the debtor corporations.

In addition, there is no assurance (and indeed a strong indication to the contrary), that if the protective order were granted to Thal, all of the other "insiders" would not then assert a similar right to protection, thereby effectively blocking the progress of the Section 167 investigation. Also, any extended delay would seriously hamper the trustees in prosecuting in a timely manner, any causes of action which may be available to the estate for recoupment of assets, by reason of the statute of limitations, 11 U. S. C. § 29.

In *In re Mutual Security Savings & Loan Ass'n. Inc.*, 214 F. Supp. 877 (D. Md. 1963), it was stated that:

> The Court must not depart from the liberal respect of the privilege [against self incrimination] so well engrafted into American Jurisprudence, but an improvident honoring of the privilege in derogation of the rights of the numerous creditors . . . is to be avoided.

We emphatically agree with this observation.

ORDER.

AND NOW this 11th day of July 1968, it is HEREBY ORDERED that the petitioner Morise Thal is directed to be sworn and to testify as a witness in such depositions as may be scheduled by the trustees of the debtor corporations pursuant to Section 167 of the Bankruptcy Act. This Order is without prejudice to or in derogation of the rights of the petitioner to exercise any Constitutional privilege, in accordance with this Opinion and Order, which he may have.

IT IS FURTHER ORDERED that the petitioner's countermotion for a protective order is DENIED.

BY THE COURT:

JOHN MORGAN DAVIS, *J.*

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1369

MORISE THAL, PETITIONER

v.

RALPH W. PITMAN AND ISADORE H. BELLIS, TRUSTEES, AND SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–3a) has not been officially reported. The opinion of the district court (Pet. App. 6a–16a) is reported at 288 F. Supp. 786.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1969, and the court denied petitioner's timely petition for rehearing on March 19, 1969. The petition for a writ of certiorari was filed on May 7, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

350-867—69

QUESTION PRESENTED

Whether, as a party in a reorganization proceeding under Chapter X of the Bankruptcy Act, the Securities and Exchange Commission may participate in the Chapter X trustees' public examination of the former president and chief operating officer of the debtor corporations, while the Commission is conducting a separate investigation of those corporations pursuant to the federal securities laws.

STATUTE AND RULE INVOLVED

Pertinent statutes and rules are set forth in the appendix (pp. 9–13, *infra*).

STATEMENT

The petition seeks review of the Third Circuit's *per curiam* affirmance of a district court order directing the petitioner to be sworn and to testify at a trustees' examination being conducted pursuant to Section 167 of Chapter X of the Bankruptcy Act, 11 U.S.C. 567.

The matter arose in connection with the proceeding for the reorganization of Commonwealth Financial Corporation ("Commonwealth") and two subsidiaries under Chapter X of the Bankruptcy Act, 11 U.S.C. 501 *et seq.*, instituted by a voluntary petition filed in the district court on December 4, 1967 (App. 1a).[1] An order was entered on that date approving the petition and appointing respondents Ralph W. Pitman and Isadore H. Bellis as trustees. Shortly thereafter, the

[1] The appendix to briefs which was filed in the court of appeals is referred to as "App. ___a." The appendix to the petition for a writ of certiorari is referred to as "Pet. App. ___a."

Commission requested leave to file a notice of appearance pursuant to Section 208 of Chapter X, 11 U.S.C. 608, and the court approved the filing (Pet. App. 1a–2a). The Commission has been a party since that time.[2]

On March 20, 1968, acting pursuant to Section 167, the district court authorized the trustees to examine the directors and officers of the debtor corporations concerning the corporations' prior affairs (Pet. App. 6a; App. 3a). The court specifically authorized the Commission to participate in this examination (Pet. App. 6a). Counsel for the trustees then scheduled a public examination of petitioner, the former president and chief operating officer of the debtor corporations (Pet. App. 8a & n. 7; App. 18a), at which petitioner appeared but refused to be sworn and to testify. His ground for refusing was that the Commission itself was conducting a private investigation into the affairs of Commonwealth and that Commission attorneys were present at the trustees' examination (App. 21a–22a; 27a). No claim of the Fifth Amendment or any other privilege was made.

Thereafter, the trustees moved for an order directing petitioner to be sworn and to testify. The motion was granted by the district judge, who at the same time denied petitioner's motion for a protective order. In affirming the district judge's ruling, the court of appeals particularly stressed the absence and the ready availability of any self-incrimination claim.

[2] As a party in the district court the Commission was an appellee on the appeal, *Ashbach* v. *Kirtley*, 289 F. 2d 159, 162 (C.A. 8), and is therefore a respondent before this Court (Rule 21–6 of this Court).

ARGUMENT

The decision of the court below is correct and is not in conflict with the decisions of this or any other Court. The petition presents no question warranting review by this Court.

1. The court below correctly held that, as a party to the reorganization proceeding, the Commission was entitled to participate in the trustees' Section 167 examination. As this Court has pointed out, in adopting Section 208 of Chapter X, Congress contemplated the "active participation of the SEC" [3] in reorganizations to which the Commission is a party. Participation by the Commission in all phases of a Chapter X proceeding is fully authorized by Section 208, under which the Commission becomes "a party in interest, with the right to be heard on all matters arising in such proceeding * * *" and is "deemed to have intervened in respect of all matters in such proceeding * * *" once its notice of appearance is approved.[4] The right of the Commission to participate in all phases of a reorganization proceeding has long been recognized,[5] and was reaffirmed only last year, *Securities and Ex-*

[3] *Securities and Exchange Commission* v. *American Trailer Rentals Co.*, 379 U.S. 594, 604.

[4] The breadth of this language from Section 208 is emphasized by the qualification in Section 207, 11 U.S.C. 607, that the judge may permit "a party in interest to intervene generally *or with respect to any specified matter*" (emphasis added). Section 208, like Section 206, 11 U.S.C. 606, contains no such qualification. See *In re Flour Mills of America*, 27 F. Supp. 559, 561 (W.D. Mo.).

[5] See 6A Collier, *Bankruptcy*, § 9.27 & n. 25 (14th ed. 1968).

change Commission v. *Krentzman*, 397 F. 2d 55 (C.A. 5).[6]

2. Petitioner appears not to question the propriety of a Chapter X examination while he may be under investigation for possible violations of the securities laws; he urges only that the Commission not be permitted to participate.[7] But the Commission's participation in the Chapter X investigation is to assist the trustee, not to uncover criminal violations of the se-

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[6] Petitioner argues (Pet. 8) that "[p]hilosophically there is a conflict" between the decision below and *Securities and Exchange Commission* v. *Templar*, 405 F. 2d 126 (C.A. 10). In *Templar* the court "agree[d] that Section 208 gives the Commission participation rights similar to those of other parties in a Chapter X proceeding," 405 F. 2d at 128, and, indeed, the court below appeared to cite the case for that proposition (Pet. App. 2a).

[7] Compare *United States* v. *Simon*, 373 F. 2d 649 (C.A. 2), certiorari granted *sub nom. Simon* v. *Wharton*, 386 U.S. 1030, vacated as moot, 389 U.S. 425, where the Court of Appeals for the Second Circuit rejected an argument that accountants whose depositions were sought by a Chapter X trustee in a civil suit against their firm should not have to testify until resolution of a criminal action pending against them involving the same facts. Here, no federal indictment has been returned against the petitioner. (Some months after the decision below, the Commission referred its files in this matter to the Department of Justice with the recommendation that petitioner and others be indicted for violating various sections of the federal securities laws and the conspiracy statute, 18 U.S.C. 371; petitioner has been apprised of the referral and recommendation by letter.) Additionally, in *Simon*, as noted by the district court, 262 F. Supp. 64, 68 (S.D.N.Y.), the damage suit was being "actively prosecuted"; the trustees' examination here, as to petitioner, is basically to ascertain facts pertaining to possible causes of action available to the estate and also pertaining to the formulation of a Chapter X plan.

curities laws.[8] The purpose of such investigation is to make a full and complete inquiry into "the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof" (Section 167(1)) to determine whether reorganization is feasible, and, if so, to work out a fair plan. The trustee is also authorized to inquire into "fraud, misconduct, mismanagement and irregularities, and * * * any causes of action available to the estate" (Section 167(3)). As a party to the proceeding, the Commission is entitled to assist the trustees in their inquiry. Possible violations of the securities laws by the debtor corporations' former officials become relevant to the Chapter X investigation only because such violations might affect the validity or rank of their claims against the corporations and might give rise to causes of action against them.[9]

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[8] It is true that where it appears that violations of the securities laws may have occurred, Commission counsel generally warn witnesses at Section 167 examinations of the right to invoke the privilege against self-incrimination and to be represented by counsel. Petitioner quotes, out of context, a portion of such a warning and asserts that Commission counsel were prepared to examine him on matters involving violations of the federal securities laws (Pet. 6). But a reading of the warning in context (App. 23a) makes clear that the Section 167 examination was not to be used for any purpose other than that set forth in Chapter X.

[9] *Hooper* v. *Mountain States Securities Corp.*, 282 F. 2d 195 (C.A. 5), certiorari denied, 365 U.S. 814. For recent suits instituted by Chapter X trustees against former management officials and others based on violations of the federal securities laws, see, *e.g.*, *In the Matter of Continental Vending Machine Corp.*, E.D.N.Y., No. 63–B–663, and *In the Matter of Westec Corporation*, S.D. Texas, No. 66–H–62.

3. The Commission has independent power to investigate violations of the securities laws to decide whether to invoke the criminal process, and does not need the assistance of Section 167 examinations for that purpose.[10] Nor does a distinction between public and private proceedings have the significance petitioner seeks to attach to it. While most Commission investigations are private, the Commission has authorized its staff to turn over material gathered in its investigations to government officials, court-appointed officers (including Chapter X trustees), and even to private parties, where it believes public investors would benefit.[11] Section 21 of the Securities Exchange Act of 1934, 15 U.S.C. 78u, authorizes the Commission to publish any material gathered in an investigation; the Commission's rules specify that the prohibition against disclosure of information by Commission employees does not continue where "* * * the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest." 17 CFR §§ 230.122 and 240.0–4 (see pp. 10, 13, *infra*).

4. Requiring petitioner to be sworn and to testify in the pending Section 167 examination can abridge

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[10] See, Section 20 of the Securities Act of 1933, 15 U.S.C. 77t; Section 21 of the Securities Exchange Act of 1934, 15 U.S.C. 78u; Section 18 of the Public Utility Holding Company Act of 1935, 15 U.S.C. 79r; Section 321 of the Trust Indenture Act of 1939, 15 U.S.C. 77uuu; Section 42 of the Investment Company Act of 1940, 15 U.S.C. 80a–41; Section 209 of the Investment Advisers Act of 1940, 15 U.S.C. 80b–9.

[11] The debtor corporations have approximately 1500 public investors.

no constitutional privilege. On proper objection, he can refuse to answer any question that would tend to incriminate him. But the Fifth Amendment does not allow him categorically to refuse to participate in the examination. As Mr. Justice Holmes pointed out in *United States* v. *Sullivan*, 274 U.S. 259, 263–264, where the Court reversed the reversal of a conviction for refusal to file an income tax return:

> If the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return, but could not on that account refuse to make any return at all. * * * He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. * * *

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
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PHILIP A. LOOMIS, JR.
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HARVEY A. ROWEN,
Attorney,
Securities and Exchange Commission.

MAY 1969.

APPENDIX

Bankruptcy Act (Chapter X):

SECTION 167

The trustee upon his appointment and qualification—

(1) shall, if the judge shall so direct, forthwith investigate the acts, conduct, property, liabilities, and financial condition of the debtor, the operation of its business and the desirability of the continuance thereof, and any other matter relevant to the proceeding or to the formulation of a plan, and report thereon to the judge;

(2) may, if the judge shall so direct, examine the directors and officers of the debtor and any other witnesses concerning the foregoing matters or any of them;

(3) shall report to the judge any facts ascertained by him pertaining to fraud, misconduct, mismanagement and irregularities, and to any causes of action available to the estate;

(4) may, subject to the approval of the judge, employ such person or persons as the judge may deem necessary for the purpose of assisting the trustee in performing the duties imposed upon him under this chapter;

* * * * *

SECTION 208

The Securities and Exchange Commission shall, if requested by the judge, and may, upon its own motion if approved by the judge, file a notice of its appearance in a proceeding under this chapter. Upon the filing of such a notice, the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding, and shall be

deemed to have intervened in respect of all matters in such proceeding with the same force and effect as if a petition for that purpose had been allowed by the judge; but the Commission may not appeal or file any petition for appeal in any such proceeding.

Rule under the Securities Act:

RULE 122. NONDISCLOSURE OF INFORMATION OBTAINED IN THE COURSE OF EXAMINATIONS AND INVESTIGATIONS

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 8 (*e*) or 20 (*c*) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other nonpublic records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or documents sought, and any circumstances which may bear upon the desirability of making available such information or documents.

Securities Exchange Act:

INVESTIGATIONS; INJUNCTIONS AND PROSECUTION OF OFFENSES

SECTION 21

(a) The Commission may, in its discretion, make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of this title or any rule or regulation thereunder, and may require or permit any person to file with it a statement in writing, under oath or otherwise as the Commission shall determine, as to all the facts and circumstances concerning the matter to be investigated. The Commission is authorized, in its discretion, to publish information concerning any such violations, and to investigate any facts, conditions, practices, or matters which it may deem necessary or proper to aid in the enforcement of the provisions of this title, in the prescribing of rules and regulations thereunder, or in securing information to serve as a basis for recommending further legislation concerning the matters to which this title relates.

(b) For the purpose of any such investigation, or any other proceeding under this title, any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry. Such attendance of witnesses and the production of any such records may be required from any place in the United States or any State at any designated place of hearing.

(c) In case of contumacy by, or refusal to obey a subpena issued to, any person, the Commission may invoke the aid of any court of the

United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, correspondence, memoranda, and other records. And such court may issue an order requiring such person to appear before the Commission or member or officer designated by the Commission, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. Any person who shall, without just cause, fail or refuse to attend and testify or to answer any lawful inquiry or to produce books, papers, correspondence, memoranda, and other records, if in his power so to do, in obedience to the subpena of the Commission, shall be guilty of a misdemeanor and, upon conviction, shall be subject to a fine of not more than $1,000 or to imprisonment for a term of not more than one year, or both.

(d) No person shall be excused from attending and testifying or from producing books, papers, contracts, agreements, and other records and documents before the Commission, or in obedience to the subpena of the Commission or any member thereof or any officer designated by it, or in any cause or proceeding instituted by the Commission, on the ground that the testimony or evidence, documentary or otherwise required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subject to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which

he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

* * * * *

Rule under the Securities Exchange Act:

RULE 0–4. NONDISCLOSURE OF INFORMATION OBTAINED IN THE COURSE OF EXAMINATIONS AND INVESTIGATIONS

Information or documents obtained by officers or employees of the Commission in the course of any examination or investigation pursuant to section 17(a) or 21(a) shall, unless made a matter of public record, be deemed confidential. Officers and employees are hereby prohibited from making such confidential information or documents or any other nonpublic records of the Commission available to anyone other than a member, officer, or employee of the Commission, unless the Commission authorizes the disclosure of such information or the production of such documents as not being contrary to the public interest. Any officer or employee who is served with a subpoena requiring the disclosure of such information or the production of such documents shall appear in court and, unless the authorization described in the preceding sentence shall have been given, shall respectfully decline to disclose the information or produce the documents called for, basing his refusal upon this rule. Any officer or employee who is served with such a subpoena shall promptly advise the Commission of the service of such subpoena, the nature of the information or document sought, and any circumstances which may bear upon the desirability of making available such information or documents.

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SUPREME COURT, U. S.

MAY 21 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968.

No. 1369.

In the Matter of

COMMONWEALTH FINANCIAL CORPORATION AND ITS SUBSIDIARIES, NEIGHBORHOOD FINANCE CO., INC. AND NEIGHBORHOOD FINANCE CO., INC. OF PENNSYLVANIA, Debtors.

MORISE THAL, Petitioner.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION FOR RESPONDENTS RALPH W. PITMAN AND ISADORE H. BELLIS, TRUSTEES.

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IN THE MATTER OF

COMMONWEALTH FINANCIAL CORPORATION AND ITS SUBSIDIARIES, NEIGHBORHOOD FINANCE CO., INC. AND NEIGHBORHOOD FINANCE CO., INC. OF PENNSYLVANIA, *Debtors.*

MORISE THAL, *Petitioner.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF IN OPPOSITION FOR RESPONDENTS RALPH W. PITMAN AND ISADORE H. BELLIS, TRUSTEES.

QUESTIONS PRESENTED.

Respondents have no objection to the statement of Questions No. 1, 2 and 3(a). Respondents object to Questions 3(b) and (c) as containing factual matter not suported by the Record. (See Statement of Case below.)

STATEMENT OF THE CASE.

The facts as set forth in Petitioner's statement are correct except as hereafter supplemented or modified.

Petitioner is the chief executive officer of the Debtor, and his testimony is essential to a full understanding of the complex operation of Debtor's business and past transactions, involving 12 subsidiary corporations and over 9 million dollars in assets.

At the inception of the depositions, counsel for the Securities and Exchange Commission did not indicate an intention to direct his interrogation to violations of the Securities Acts. Because the contemplated examination of the witness (Petitioner) with respect to the legitimate subject matter of the reorganization proceeding might disclose facts which tend to show criminal violations, the witness was properly cautioned that this might occur and that his privilege against self-incrimination was available, should he desire to exercise it.

At no time has the Commission or counsel for the Trustees conceded that the Commission has disclosed or will disclose to the Trustees information developed in its non-public investigation. The disclosure of such information, if it should take place, is deemed to be irrelevant to the issues in this appeal.

Although the following information is not formally a part of this record, the Court of Appeals was advised at the oral argument by counsel for Respondents, and it is a matter of public knowledge, that Petitioner was indicted in December 1968 by the Commonwealth of Pennsylvania on various charges of embezzlement, making fraudulent acts and falsifying corporate records, as to transactions involving the Debtor in December 1962.

ARGUMENT.

I. The Decision in This Proceeding by the Court of Appeals Is Not in Conflict With Other Reported Cases.

Section 208 (11 U. S. C. A., Sec. 608) of the Bankruptcy Act permits the Securities and Exchange Commission to intervene and become a party to a corporate reorganization proceeding under Chapter X. It provides, in part:

> . . . "the Commission shall be deemed to be a party in interest, with the right to be heard on all matters arising in such proceeding . . ."

The Commission became a party and has participated in these proceedings. Subsequently, the Trustees were authorized to conduct an examination of witnesses, including Petitioner as an officer of the Debtor, pursuant to Section 167 (11 U. S. C. A., Sec. 567). By further order, the court authorized the Commission to participate in such examination.

Petitioner refused to be sworn or to testify on the ground that the Commission had no right to participate.

The Court of Appeals, in affirming the judgment of the District Court, held that the Commission has the right to participate in an examination of witnesses under Section 167. The authority for such participation is derived from Section 208.

Petitioner refers to *Securities and Exchange Commission v. Templar,* 405 F. 2d 126 (CCA 10th, 1969) as creating a conflict between the circuits, at least in principle. The cited decision is readily distinguishable from the instant case. In *Templar,* the Trustee amended his plan of reorganization by omitting a provision classifying stockholders as creditors, the earlier provision having been based upon

certain alleged misrepresentations by the Debtor. No stockholder filed a claim within the time fixed by the court or took any other action. Thereafter, the Commission presented a motion to have the omitted provision reinstated. The Court of Appeals held that the Commission, under the circumstances, had no standing to press the motion on behalf of stockholders, who were now barred from filing claims. The Commission, the court stated, could not assert "superior rights" to those of the shareholders.

Petitioner argues that in the instant case (contrary to the spirit of the *Templar* holding) the court accorded the Commission a "superior" right to examine witnesses which, it is claimed, is not available to individual holders of securities.

The analogy is unsound.

In *Templar,* the Commission was attempting to secure for stockholders substantive rights which individually they were barred from presenting. Certainly it was not unreasonable for the court to refuse to allow the Commission a "superior" standing than the shareholders had in the protection of their individual rights.

In the present situation, the plan is still to be filed, and no time has been fixed for the filing of claims by the holders of securities. The rights of security holders have not yet been adjudicated. Section 167 provides that the Trustee shall make an investigation of the financial affairs of the Debtor if the court so authorizes. It does not provide that *only* the Trustee may participate in the investigation. The objective of the examination is to develop information which will benefit creditors and shareholders. However, it is not practical to allow every member of a large group of creditors or shareholders to participate individually in the examination of witnesses. This function is performed by their representatives, namely, the Trustee, creditor and share-

holder committees, and the Securities and Exchange Commission. The rights exercised by their representatives in examining witnesses are those, in effect, belonging to the creditors and shareholders, on whose behalf and for whose benefit the investigation is conducted. Accordingly, the Commission is not invested with standing "superior" to that of creditors and shareholders but rather is the means, with the Trustee and committees, of implementing, in the only practical way, those rights fundamentally belonging to creditors and shareholders.

In an appropriate case, in the discretion of the court, an individual creditor or shareholder might well be permitted to participate in the examination of a witness. This occurs more logically from time to time in the hearings under Sections 169 and 179, respectively, on the approval and confirmation of the plan. But, there is no reason why it cannot be done in the 167 investigation as well.

II. The Instant Case Is Not the First Decision Authorizing the Commission to Examine Witnesses in Chapter X Proceedings.

In *Securities and Exchange Commission v. Krentzman*, 397 F. 2d 55 (5th Cir. 1968), the court held that the Commission had the right to participate in a hearing on a petition by a Chapter X Trustee to recover property, consisting of a block of stock, from a third party, and *such participation included the right to cross-examine witnesses.* The court stated that to deny the Commission the privilege to examine witnesses constituted an abuse of discretion. Although the cited case was directly concerned only with the interrogation of witnesses in a specific controversy between the Trustee and third parties, the opinion of the court was based upon the board principle that the Commission's participation in a reorganization proceeding is

almost unlimited in scope. It will certainly be difficult, if not impossible, for the Commission to discharge its many responsibilities under Chapter X of the Bankruptcy Act unless it can join in all examinations of witnesses whether by way of discovery or in connection with specific disputes. Actually the right of the Commission to question witnesses would appear to be much more logical and important in discovery proceedings if it is to do its job effectively than in regard to a hearing involving a specific controversy with a third party. Accordingly, the recognition of such right in the latter instance would a fortiori embrace the former.

III. The Instant Decision Is Clearly Correct and Is Not in Derogation of the Legitimate Rights of Petitioner.

Section 208 of the Act (quoted above) is a broad grant of status and authority, establishing clearly that the Commission is a party for all purposes and has the full right to be heard on all matters.

Petitioner appears to agree that the Commission, as a disinterested and expert agency, has extensive powers and duties in a reorganization proceeding, in the nature of an *amicus curiae*. Petitioner argues, however, that the Commission's authority is limited and is mainly advisory, that Section 208 does not include the right to examine witnesses in a Section 167 examination, and that such examination is restricted to the Trustees. Section 167 provides that the Trustee shall make an investigation of the financial affairs of the Debtor if the court so authorizes. It does not provide that *only* the Trustee may participate in such investigation. Even though individual creditors and shareholders may be excluded from taking part in 167 examinations, in the discretion of the court, by reason of the practical difficulties and additional burdens their widespread participation might impose, certainly creditor and share-

holder committees and the Securities and Exchange Commission fall into a different category. As a party to the proceedings entitled to be heard on all matters, the Commission could not effectively perform its functions under the Bankruptcy Act without the right to examine witnesses. The role of the Commission is not merely as an advisor of the Trustee. It is also an independent agency charged with the protection of the public before the court; and it must be assumed that Congress in granting the Commission the right to be heard on all matters intended that it be empowered by all usual means, including the right to examine witnesses, to carry out this responsibility in the fullest sense.

Petitioner contends that even if the Commission generally has the right to participate in an examination by a Trustee under Section 167, this right should be denied in this case because the Commission is presently conducting a non-public investigation of the Debtor and of Petitioner as an officer of the Debtor to ascertain whether criminal violations of federal securities laws have been committed.

Petitioner fails to explain satisfactorily how the concurrence of the two investigations, one by the Commission and the other by the Trustees, provides a legal premise for objecting to the latter. He appears to be arguing that he fears the Commission will, in the Trustees' examination, have the benefit of a second attempt to develop criminal violations. But, the two investigations have different objectives. The Commission is seeking to establish violations of the securities laws. The Trustees are trying to develop facts concerning the assets, liabilities, acts, conduct and financial transactions of the Debtor. The Trustees require such information to assist them in formulating a plan of reorganization and also to determine whether any wrongdoing occurred which would give rise to causes of

action for damages or the recovery of property. The Commission's participation in a Chapter X proceeding is restricted to the inherent purposes of such proceeding. As a by-product, the Chapter X examination may develop material relevant to the reorganization which also tends to show the existence of criminal offenses. This occurs frequently in bankruptcy proceedings but is hardly a justification for staying an investigation as long as witnesses are accorded their full constitutional privileges.

Realistically, all that Petitioner seeks to accomplish is the avoidance of the necessity of exercising his privilege against self-incrimination. The apparent purpose of this appeal is to delay such occasion. As a witness, he is fully protected by his right to assert his constitutional privilege against self-incrimination during any examination which may be conducted by the Trustees or the Commission.

An indefinite stay of his examination would defeat the clear objectives of two coordinate Acts of Congress. The Securities Acts of 1933 and of 1934 authorize the investigation and the private examination now being conducted by the Securities and Exchange Commission. Section 167 of the Bankruptcy Act provides for the examination presently being sought by the Trustees. The fact that the two examinations may overlap and that representatives of the Commission are parties to the reorganization proceeding creates no special prejudice or legal burden for the witness which is not justified by the overall situation and the necessity to complete the tasks at hand. The coincidental interaction of the operation of the two Congressional enactments is entirely consistent with their respective provisions, and in no way represents a conflict of policy.

The witness is not entitled to a blanket invocation of the privilege against self-incrimination. Nor may he have

general protection from possibly incriminating questions other than by asserting his constitutional rights under the Fifth Amendment. *Communist Party v. Subversive Activities Control Board,* 367 U. S. 1, 108 (1961); *In re Hoffman Can Corp.,* 373 F. 2d 622 (CCA 3rd, 1967).

United States v. Simon, 373 F. 2d 649 (CCA 2nd, 1967), *certiorari granted sub nom., Simon v. Wharton,* 386 U. S. 1030 *vacated as moot,* 389 U. S. 425 (1967), is not directly in point. There the Trustee in a Chapter X reorganization proceeding sued to recover damages resulting from a conspiracy to despoil assets of the Debtor. In the pending civil action, the Trustee sought to take the depositions of the defendants. A motion to stay the depositions was filed on the ground that a criminal prosecution was pending against the same defendants based upon facts substantially similar to those set forth in the civil complaints. The protective order was denied.

The present appeal involves a general examination of a witness as part of the overall reorganization proceeding. No civil action has been instituted against him although he has been indicted by the State authorities.

Petitioner further contends that the participation of the Commission in the Trustees' examination, which is, of course, public, in effect enables the Commission to conduct both a private and public investigation at the same time without according the witness the same rights and safeguards available to him under Securities Regulations. As pointed out above, the examination by the Trustees is pursuant to the provisions of Section 167 of the Bankruptcy Act and has entirely different objectives from the private investigation of the Commission. The attorneys for the Commission are taking part in the reorganization proceeding within the scope of its purposes and will be bound thereby in their examination. Questions, if any, designed

solely to establish criminal violations and having no bearing on the subject matter of the reorganization proceeding as defined in Section 167 will be objectionable.

Petitioner argues that the Commission has already indicated an intention to violate the permissible scope of the examination under Section 167 as demonstrated by the warning of its attorneys to the Petitioner at the inception of the depositions that he is entitled to refuse to answer questions on the ground of self-incrimination inasmuch as violations of the securities laws may be involved in his testimony. Petitioner distorts the purport of the Commission's statement to the witness. It in no way supports the assertion that the Commission plans to ask questions conceived primarily to show criminal offenses under the federal securities statutes. As set forth above, interrogation directed to the legitimate objectives of the reorganization proceeding may well disclose facts which tend to show criminal violations. The Commission's statement quite properly cautioned the witness that this might occur and suggested to him that his privilege against self-incrimination will in such event be available should he desire to exercise it.

Finally, Petitioner complains that the Commission, in violation of its own Rules, has expressly or unconsciously given the Trustees information developed in its non-public investigation, or the benefit thereof. If it be true that in consultations between counsel for the Trustees and representatives of the Commission assistance has been unwittingly given stemming from material developed in the non-public investigation of the Commission, this can be counted as a coincidental by-product inherent in the Congressional scheme of two concurrent and overlapping procedures under separate statutes designed to effectuate different but related policies. It is to be noted that the secrecy

Rule applying to the results of the Commission's non-public investigation originated with the Commission, not with Congress, and disclosure may be made if authorized by the Commission. In any event, a violation of the Commission's Rule without a showing of complicity on the part of the Trustees is a matter between Petitioner and the Commission. It represents no proper ground for staying the examination of the Trustees under Section 167.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 14, 1969.